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No. 84-592

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NORMAN WILLIAMS and SUSAN LEVINE,
Appellants,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Introduction

Appellees' Brief presents a welter of confused policies, principles, and logic. This reply attempts to sort out appellees' arguments while pointing out their flaws. Parts I and II will address the Fourteenth Amendment issues raised by the appeal; Part III will concern the Commerce Clause.

I. APPELLEES' INTERPRETATION OF VERMONT'S MOTOR VEHICLE PURCHASE AND USE TAX CANNOT BE SQUARED WITH THE RECORD AND IS INSUFFICIENT TO SAVE THE STATUTE IN ANY CASE.

Appellants believe the simple premise of their Fourteenth Amendment claim in this case bears repeating: individuals (like appellants) who move to Vermont are forced to pay a four percent tax on their automobiles and are not granted credit for similar (or

higher) taxes already paid in other states. In contrast, Vermont residents who (like appellants) purchase their cars in another state are granted a credit for taxes paid the other state. The simple, undeniable fact is that Vermont discriminates against nonresidents with respect to this tax in order to increase state revenues. The simple, undeniable law is that state revenues cannot be increased at the expense of the fundamental constitutional rights of individuals. Sosna v. Iowa, 419 U.S. 393 at 406 (1975).

Appellees attempt, as it were, to pull the rug from appellants' Fourteenth Amendment argument by denying its premise. They contend that Vermont residents who (like appellants) purchase and register automobiles in other

states also are not entitled to a tax credit.[1] Their contention: 1) contradicts the face of the statute itself; 2) is not supported by any judicial interpretation; and 3) is insufficient to save the statute in any event.

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1. They also suggest that, since other states frequently allow nonresidents to purchase automobiles without paying sales tax, provided such automobiles are removed within two or three weeks, most Vermont residents purchasing automobiles in other states pay a full four percent motor vehicle tax to Vermont in any event. There is nothing whatever in the record to support this assertion. Even if it were true, it would have little bearing on this case, since "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of statutes of another State." Austin v. New Hampshire, 420 U.S. 656 at 668 (1975).

A. The Vermont Motor Vehicle Tax Must Be Interpreted In Accordance With Its Express Terms.

There is, first of all, nothing whatever in the statute to even suggest that Vermont residents who register cars in other states are not entitled to a tax credit when they seek to register their cars in Vermont.[2]

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2. Appellees seemed to recognize this difficulty in their brief to the Vermont Supreme Court when they said: "Read in a vacuum §8911(9) could be interpreted as granting a tax credit to a Vermonter who permanently registers the car in another state." Appellees' Brief dated July 19, 1983, at 19, note 2 (Vermont Supreme Court). Elsewhere, appellees have suggested that their unique view is contained in an interpretation which has "not been formally promulgated," Appellee's Reply to Petition for Rehearing at 2, note 1, in Leverson v. Conway, No. 84-315 (1984), even though Vermont law requires such interpretations to be published, commented upon, and formally filed
(Footnote Continued)

Rather, Vt. Stat. Ann. tit. 32, §8911 provides:

> The tax imposed by this chapter shall not apply to:
> . . .
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

Nor do appellees supply any support whatever for their bald statement that the "Vermont legislature did not intend to afford credit under section 8911(9) for tax paid on an automobile which had first been registered in another

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(Footnote Continued)
before they can become effective. See Vt. Stat. Ann. tit. 3, §§836 et seq. (Administrative Procedure Act).

state." Appellees' Brief at 9. Appellees' argument that the repeal of Vt. Stat. Ann. tit. 32, §8911(6) is "further evidence" of such an intent on the part of the legislature, Appellees' Brief at 11, strains credulity. As noted in Appellants' Brief (at 11, note 14), former section 8911(6) exempted nonresidents who had registered and used automobiles in other states from the Vermont motor vehicle tax. It is impossible to see how repeal of that exemption could possibly suggest that residents who registered cars in other states were not entitled to the credit available to them under section 8911(9).

Appellants respectfully suggest that appellees' unfounded interpretation of section 8911(9) is a post-hoc

attempt to salvage a law which is beyond repair. Appellants believe this Court should do exactly what the Court did in Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967), when confronted with the argument that, although a statute was unconstitutional on its face, appellees did not administer it in accordance with its terms: the Court should reject the argument out-of-hand. Id. at 599.

B. Appellees' Interpretation Of The Motor Vehicle Tax Statutes Cannot Be Squared With The Opinion Of The Vermont Supreme Court.

Appellees' argument that the Vermont Supreme Court so interpreted the statute is equally ill-taken. Indeed, that court explicitly found in Leverson v. Conway, 144 Vt. 523, 527

481 A.2d 1029 (1984), J.A. 22-23, that residents "who purchase cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont," whereas "a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent." That is exactly what appellants contend.

There is simply no suggestion in the Vermont Supreme Court's opinion that a Vermont resident who purchased and registered his car outside of Vermont would not be entitled to a credit under Vt. Stat. Ann. tit. 32, §8911(9), as appellees seem to believe. See Appellees' Brief at 2-4. The Vermont court's statement that the tax

is triggered by registration in the state, discussed on page 8 of Appellees' Brief, refers to the timing of the tax-- it in no way suggests that Vermont residents who registered automobiles in other states would not be granted a tax credit. The fact remains, as discussed in appellants' first brief, that the decision to reside in Vermont, because it leads to the necessity of registering one's car, which in turn leads to the necessity of paying a four percent tax on that car, results in a tax which is not imposed on Vermont residents. That result cannot be justified under the Fourteenth Amendment.

C. Appellees' Interpretation Of The Motor Vehicle Tax Would Not Save The Statute Under The Fourteenth Amendment.

Finally-- and this is the larger point-- even if the Vermont legislature altered the law to coincide with appellees' view, appellees would take very little from it. A statutory scheme which granted a credit with respect to taxes paid on cars purchased in other states but not with respect to cars purchased and registered in other states would still discriminate impermissibly against nonresidents. It is not difficult to see that very few Vermont residents who purchase and pay sales taxes on automobiles in other states actually register their cars in such states. Accordingly, out-of-state automobile registration would be merely a proxy for nonresidence and could not

be used as the basis for imposing a tax, any more than an ordinance forbidding wooden laundries could be used to discourage Chinese businessmen, Yick Wo v. Hopkins, 118 U.S. 356 (1885), or literacy tests to stop black voters, Guinn v. United States, 238 U.S. 347 (1915).

In sum, no one has ever doubted that the Equal Protection Clause applies to classifications which are ostensibly neutral but are obvious pretexts for discrimination. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 at 272 (1979), and cases there cited. Appellants believe what Justice Frankfurter said about the Fifteenth Amendment applies with equal force to the Fourteenth: "The Amendment

nullifies sophisticated as well as simpleminded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939).[3]

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3. In this connection, Judge Wisdom observed in United States v. City of Jackson, Mississippi, 318 F.2d 1, 5 (5th Cir. 1963) (footnotes omitted):

> This disingenuous quibble must rest on the assumption that federal judges are more naive than ordinary men. But in the sector of the law encompassed in the subject 'Civil Rights,' case by case federal courts have acquired a thorough education in 'Sophisticated Circumvention.'

Appellants believe little more than an elementary course is required to see through appellees' argument.

II. THE ASSERTED PURPOSE OF VERMONT'S MOTOR VEHICLE PURCHASE AND USE TAX DOES NOT JUSTIFY THE DISCRIMINATION AGAINST APPELLANTS.

The Vermont Supreme Court stated that the tax credit provided by Vt. Stat. Ann. tit. 32, §8911(9), was designed to encourage out-of-staters "to purchase their vehicles in Vermont and pay a sales tax to Vermont." Leverson, 144 Vt. at 532, 421 A.2d 1029, J.A. at 29. Appellees, conversely, insist that the "obvious objective" of section 8911(9) is to allow Vermont residents to purchase cars in other states. Appellees' Brief at 7.

However that may be, both of these purported justifications are irrelevant to the instant case. The question here is whether Vermont may extend a tax credit to residents which it does not

extend to nonresidents, not whether it may grant residents a credit for taxes paid other states-- for this it surely may do. In other words, the issue of whether Vermont may encourage local business (according to the Vermont Supreme Court) or interstate commerce (according to appellees) by means of a tax credit has nothing to do with whether Vermont may discriminate against nonresidents in its taxing laws. To date, the only convincing rationale put forward for this tax discrimination is the need to raise revenue, and that is patently insufficient. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

The cases on which appellees rely to justify Vermont's motor vehicle purchase and use tax scheme are

unavailing. Both Kane v. New Jersey, 242 U.S. 160 (1916), and Hendrick v. Maryland, 235 U.S. 610 (1915), discussed at page 15 of Appellees' Brief, upheld state statutes under the Equal Protection Clause which required residents and nonresidents to pay small but identical fees for the use of state highways. Kane ruled that the statute involved did not discriminate against nonresidents since they were required to pay no more than residents in the same position. Such equal payment plainly does not exist in the instant case, since appellants have been forced to pay Vermont a four percent tax in a situation where residents would pay nothing. In Hendrick, the Maryland statute actually provided for reciprocity with respect to

nonresidents registered in their home state, which is notably absent here. [4]

Storaasli v. Minnesota, 283 U.S. 57 (1937), discussed at pages 15-16 of Appellees' Brief, is also inapposite. Just as in Kane, Storaasli involved a state statute imposing highway user fees on residents and nonresidents alike. The Storaasli court upheld the fee against the plaintiff, a soldier on a Minnesota army base, since he would be forced under it to pay no more than similarly-situated state residents. As

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4. Aside from the fact that their holdings do not support appellees' position, Kane and Hendrick, because of their age, are of doubtful authority in the face of the modern equal protection analysis applied in Shapiro v. Thompson, 394 U.S. 618 (1966), and related cases. Appellees' discussion of the Shapiro line of cases is conspicuous by its absence.

discussed above, equal payment is simply not the case here.

III. THE VERMONT MOTOR VEHICLE PURCHASE AND USE TAX IS NOT FAIRLY APPORTIONED AS THE COMMERCE CLAUSE REQUIRES.

Appellees' insistence that, under Vt. Stat. Ann. tit. 32, §8911(9), the four percent Vermont motor vehicle tax applies to every car previously registered in another state lends additional force to appellants' Commerce Clause claim. It is plain that such a tax, if imposed by every state, would substantially affect the automobile purchasing plans of all those moving from one state to another. For example, an individual in Oregon planning to move to Maine would be unlikely to purchase a new car for the journey, since, by doing so, he would subject himself to

tax in both states. From a tax standpoint, his most intelligent course would lie in selling his car in Oregon, moving to Maine, and buying a new car there, even though such a course might have nothing to do with his legitimate needs. This result cannot be harmonized with Container Corp. of America v. Franchise Tax Board, 103 S.Ct. 2933 (1983), or Armco, Inc. v. Hardesty, 52 U.S.L.W. 4787 (1984).

Appellees seem to believe that their mere designation of Vermont's tax as a "user fee" serves as a talisman to ward off any and all Commerce Clause challenges. See Appellees' Brief at 26-30. In fact, this Court has held repeatedly that a user fee must be apportioned fairly, like any other levy, to pass muster under the Commerce

Clause. See, e.g., McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 181 (1940) (levy must be "measured by or [have] some fair relationship to the use of the highways for which the charge is made"); Interstate Transit v. Lindsey, 283 U.S. 183, 185 (1931) (tax on motor busses must be "a fair contribution to the cost of constructing and maintaining [public highways] and of regulating the traffic thereon"); Sprout v. South Bend, 277 U.S. 163, 169-170 (1928).

Despite appellees' contention that "[a] one-time fee based upon the fair market value of the vehicle is reasonable compensation for the temporally unlimited privilege provided by

Vermont," Appellees' Brief at 30,[5] a less fair method of apportioning the "fee" could scarcely be devised. The fairest approach would consider type of vehicle, tonnage, and mileage for a specified period. A less fair method (though still superior to Vermont's) would impose a flat fee for a month, or even annually, perhaps still taking into account the vehicle's weight. A one-time percentage tax, such as Vermont's, however, based on the value

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5. The case cited for this proposition, Capital Greyhound Lines v. Brice, 339 U.S. 542 (1950), does not support it, since the tax there was imposed in connection with a mileage adjustment. Moreover, appellants question whether Capital Greyhound would be decided the same way today, in view of Justice Frankfurter's strong and well-reasoned dissent. See id. at 548.

of the motor vehicle alone, bears almost no relationship to the likely value of future highway use. Indeed, a similar flat tax on busses, ostensibly for the maintenance of city streets, was struck down by the Court in Sprout since, as it said, "A flat tax substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." 277 U.S. at 170 (Brandeis, J.).

Conclusion

This reply has tried to sort out the tangled skein of arguments in

Appellees' Brief. First, appellees' attempt to trivialize appellants' Fourteenth Amendment claims should be rejected out-of-hand by this Court. Appellees' novel interpretation of Vt. Stat. Ann. tit. 32, §8911(9) is at odds with the language of the statute itself; is unsupported by any judicial interpretation; and, in any event, is inadequate to save the Vermont motor vehicle tax from invalidation. Second, appellees' asserted justification for the tax (which contradicts that of the Vermont Supreme Court) is wholly irrelevant to the discriminatory classification challenged by this appeal. Finally, appellees' interpretation of Vt. Stat. Ann. tit. 32, §8911 does add urgency to appellants' Commerce Clause claim,

since, under that interpretation, anyone purchasing and registering a car in another state will be subject to double taxation-- and the attendant pressure to alter their purchasing decisions accordingly-- if they choose to register their car in Vermont. Appellees' simple designation of the tax as a "user fee" does not save it from this basic violation of the Commerce Clause.

For all of these reasons, the Vermont Motor Vehicle Purchase and Use Tax scheme should be stricken by this Court and amounts paid by appellants

under it refunded.

Respectfully submitted,

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